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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/789,332	02/27/2004	Leo Berbee	ANTHT.65397	1799

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EXAMINER

HWU, JUNE

ART UNIT PAPER NUMBER

1661

DATE MAILED: 02/17/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/789,332	BERBEE, LEO	
	Examiner	Art Unit	
	June Hwu	1661	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 27 February 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

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DETAILED ACTION

The declaration filed July 15, 2004 has been acknowledged.

Drawings

The drawings have been approved.

Objection to the Specification

On page 3 there appears to be a table and if so it should be labeled -- Table 1 --.

Objection to the Disclosure

37 CFR 1.163

The following is a quotation of section (a) of 37 CFR 1.163:

(a) The specification must contain as full and complete a disclosure as possible of the plant and the characteristics thereof that distinguish the same over related known varieties, and its antecedents, and must particularly point out where and in what manner the variety of plant has been asexually reproduced. In the case of a newly found plant, the specification must particularly point out the location and character of the area where the plant was discovered.

35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

In plant application filed under 35 U.S.C. 161, the requirements of 35 U.S.C. 112 are limited.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

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The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

As specific to United States Plant Patent applications, the specifics of 37 CFR 1.164 (reproduced below) are controlling:

The claim shall be in formal terms to the new and distinct variety of the specified plant as described and illustrated, and may also recite the principal distinguishing characteristics. More than one claim is not permitted.

In plant applications filed under 35 U.S.C. 161, the requirements of 35 U.S.C. are limited. The following is a quotation of 35 U.S.C. 162:

No plant patent shall be declared invalid for noncompliance with section 112 of this title if the description is as complete as is reasonably possible. The claim in the specification shall be in formal terms to the plant shown and described.

The disclosure is objected to under 37 CFR 1.163(a) because the specification presents less than a full and complete botanical description and the characteristics which distinguish over related known varieties.

More specifically:

A. The Latin name of the genus, species and variety denomination of the claimed plant should be stated and preceded by the heading set forth in 37 CFR 1.163(c)(4), (c)(5) and (d). See MPEP 1605.

B. Applicant must set forth in the specification a brief description how the new variety is distinguished from related known cultivars.

C. Page 2, line 12, the recitation "Continued observation" should be deleted and replaced with --The propagation --. In addition, the term "taken" on page 2, line 13, should be deleted.

D. Page 4, line 2, the recitation "Medium" with regard to the width of the plant is vague and does not quantitatively describe the plant spread. Correction is necessary.

E. Page 4, line 4, the recitation regarding the leaf coloration, as "137C" is vague because it is unclear if this color designation is of the upper or lower leaf surface. Clarification and correction are necessary.

F. Page 4, line 9, the term "Smooth" does not botanically describe the margin of the leaf. Term such as entire should be used.

G. Page 4, line 18, the term "Lenath" is misspelled and should be changed to read -- Length --.

H. Page 5, line 3, the recitation with regard to the number of florets per flowering scape is left blank. Correction is necessary.

I. Page 5, line 20, the term "Petal" should be deleted and changed to read --Tepal --.

J. Applicant should set forth in the specification a botanical description of the inner and outer tepals' shapes and apex shapes.

K. Fig. 1 appears to show the inner tepal with a central stripe and if so Applicant should import this information into the specification.

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L. Page 6, line 9, the recitation "14B-150B" is unclear. It is uncertain whether applicant intends the color(s) set forth to be a mixture of the two color designations, a color that varies between the two color designations, or if each color is individually present. Correction and/or clarification are necessary.

M. Page 6, line 12, the recitation "4.5" with regard to the length of the filament in millimeter does appear to correspond with the Fig. 1. The filament does not appear smaller than the anther length. Applicant should check for accuracy.

N. Page 6, line 14, the recitation "37.1" with regard to the length of the anther in millimeter does not appear to correspond with Fig. 1. The anther does not appear eight times the length of the filament. Applicant should check for accuracy.

O. Applicant should set forth in the specification the average number of pistils and stamens per flower.

P. Applicant should set forth in the specification the color designations of the pollen and stigma.

Q. Applicant should set forth in the specification whether fruit/seeds are produced. If so, Applicant should disclose such information and describe these structures in the interest of providing as complete a botanical description of the observed plant as is reasonably possible or if not produced state -- none --.

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R. If additional information is available relative to plant disease resistance/susceptibility, such should be set forth in the specification.

Conclusion

The claim is free of the prior art. However, it is noted that the specification states that the claimed plant "is also sold under the trade name RUBY STELLA" on page 2, line 5.

Applicant is reminded that any sale of the claimed plant in the United States prior to filing date of this instant plant application would bar patentability under 35 U.S.C. 102(b).

The above listing may not be complete. Applicants should carefully compare the claimed plant with the botanical descriptions set forth in the specification to ensure completeness and accuracy and to distinguish the plant within this expanding market class. Any further botanical information should be imported into the specification, as should any additional or corrected information relative to same.

Claim Rejection

35 USC § 112, 1st and 2nd Paragraphs

Claim 1 is rejected under 35 U.S.C. 112, first and second paragraphs as not being supported by a clear and complete botanical description of the plant for reasons set forth in the Objection to the Disclosure Section above.

Future Correspondence

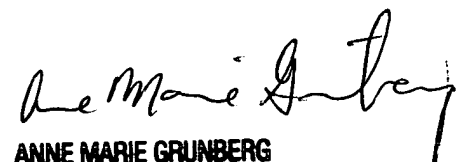
Any inquiry concerning this communication or earlier communications from the examiner should be directed to June Hwu whose telephone number is (571) 272-0977. The Examiner can normally be reached Monday through Thursday from 6:30 a.m. to 5:00 p.m.

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If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Andrew Wang, can be reached on (571) 272-0811. The fax number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

JH


ANNE MARIE GRUNBERG
PRIMARY EXAMINER